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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 653

W. DALTON LARUE, SR., ET AL., PETITIONERS

v.

STEWART L. UDALL, INDIVIDUALLY AND AS SECRETARY OF THE INTERIOR, AND NORTH AMERICAN AVIATION, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE SECRETARY OF THE INTERIOR IN OPPOSITION

OPINION BELOW

The court of appeals' opinion (Pet. App. 20a–34a) is reported at 324 F. 2d 428. The district court issued no opinion.

JURISDICTION

The judgment below was entered on October 3, 1963 (Pet. App. 35a). The petition for certiorari was filed December 2, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, under Section 8(b) of the Taylor Grazing Act, the Secretary of the Interior was authorized

in this case to exchange public land in one grazing district for privately owned land in another.

2. Whether, under the Taylor Grazing Act, the Administrative Procedure Act or the due process clause of the Fifth Amendment, the holders of licenses to graze on the lands being surrendered have a right to present evidence at a hearing as a condition precedent to such an exchange.

3. Whether Section 3 of the Taylor Grazing Act precludes such an exchange where the licensees have pledged their ranch and range rights as security for a mortgage.

STATUTE INVOLVED

The pertinent portions of Sections 3, 8, and 9 of the Taylor Grazing Act, 43 U.S.C. 315b, 315g, and 315h, are set forth in the Appendix, *infra*, pp. 13–15. The Act is set forth in its entirety at Pet. App. 1a–16a.

STATEMENT

This action was brought to enjoin the Secretary of Interior from effecting an exchange of public land under Section 8(b) of the Taylor Grazing Act (43 U.S.C. 315g(b)). The relevant facts may be summarized as follows:

In 1958, North American Aviation, Inc., to consolidate and expand its facilities for testing and developing rocket engines and fuels (J.A. 83–87),[1] filed an application to exchange some 20,000 acres which it owned in Winnemucca (Nevada) Grazing District No. 2 for 10,000 acres of public land in Carson City (Nevada) Grazing District No. 3 (Pet. App. 21a).

[1] Citation is to the joint appendix in the court of appeals which is on file with Clerk of the Court.

The Winnemucca lands had an appraised value of $90,100; the Carson City public lands were appraised at $86,400 (*ibid.*).

Petitioners have since 1953 owned a 1,600-acre ranch in the Carson City area and have used most of the 10,000 acres of public lands here involved for grazing their cattle under a license issued pursuant to the Taylor Grazing Act (43 U.S.C. 315a; see J.A. 237). The ranch, including their range rights, is subject to a deed of trust and note upon which a balance of $8,700 remains unpaid (J.A. 187–191).

Petitioners protested the exchange (J.A. 67–68) on grounds that it was not authorized by Section 8(b) of the Grazing Act (*infra*, p. 14). On November 2, 1960, the local land office approved the exchange (J.A. 50–51). On appeal by petitioners, the Bureau of Land Management (J.A. 58–66), and in turn the Secretary of the Interior (J.A. 24–32), affirmed. The Secretary found that North American sought the exchange for the purpose of carrying "on its program of testing and development in fields in which the Federal Government and the public generally have an interest" (J.A. 23, 26). The Secretary then ruled (J.A. 27)—

> * * * that the benefit to the public interests, which is the criterion of the statute, need not be related exclusively to conservation of Federal grazing resources nor need it be shown that a proposed exchange will promote range management.

Accordingly, he determined "that consummation of the proposed exchange would be in the public interest"

(J.A. 31). As additional support for his decision, the Secretary found that (J.A. 31)—

> * * * acquisition of the offered lands would block out holdings of public lands and would facilitate the administration and management of the area for grazing purposes.

Petitioners brought this action to enjoin execution of the exchange (J.A. 3–20). The district court granted summary judgment in favor of the Secretary (J.A. 239), and the court of appeals affirmed. It held that the Secretary correctly construed Section 8(b) as permitting exchanges when the "public interest" to be benefited is the interest in national defense, but that even under petitioners' narrow view that "public interests" as used in Section 8(b) is limited to grazing purposes, the exchange was proper (Pet. App. 23a–24a).[2] The court rejected petitioners' argument that a hearing was required by the Administrative Procedure Act or the Fifth Amendment on grounds that the Taylor Grazing Act does not require a hearing before an exchange (Pet. App. 26a–27a) and that the Fifth Amendment contention (Pet. App. 26a)—

> disregards the provision of § 3 of the Act (43 U.S.C. § 315b) that "* * * So far as consistent with the purposes and provisions of this chapter, grazing privileges recognized and acknowledged shall be adequately safeguarded, but the creation of a grazing district or the issuance

[2] Chief Judge Bazelon, concurring (Pet. App. 27a–34a), would have affirmed on the Secretary's alternative ground that the exchange would benefit grazing interests.

> of a permit pursuant to the provisions of this chapter, shall not create any right, title, interest, or estate in or to the lands." The command of Congress that grazing privileges shall be adequately safeguarded "so far as consistent with the purposes and provisions of this chapter" does not mean that a grazing permit is to prevent the Government's exercise of the right of exchange, which is "one of the provisions of this chapter."

Finally, the court held that since Section 3 specifically provides that permits do not create a vested interest against the United States, the existence of a mortgage on the petitioners' ranch did not prevent the United States from exchanging the public lands (Pet. App. 25a).

ARGUMENT

I. The court properly affirmed the Secretary's determination that the "public interests will be benefited" by the exchange. As stated by the court (Pet. App. 23a), the term "public interests" in Section 8(b) is not limited in any way by the words of the Act, nor can any limitation properly be implied from the remainder of the statute. Indeed, the contrary is true. A reading of the entire Section 8 makes it clear that "public interests" is to be broadly construed. Thus, Section 8(a) specifies that a benefit to the grazing district or public land management must be shown to warrant accepting a gift of land under this section. On the other hand, Section 8(c) does not require any benefit to be shown when a State applies to exchange lands. Section 8(b) requiring

that "public interests be benefited" is quite apparently a midway position authorizing any exchange for privately owned lands which the Secretary finds to be in the general public interest.

Petitioners' contention that the authorization is limited to exchanges which will benefit grazing districts is inconsistent with the reach of the statute. Thus, Section 8(b) authorizes the exchange of public and private lands which are not within any grazing district as well as the exchange of public lands within a grazing district for private lands which are not. Obviously, Congress, which in Section 8(a) carefully limited the authority to "action [which] will promote the purposes of a district or facilitate the administration of the public lands," intended to impose a broader standard here.

Under the circumstances, the Secretary quite reasonably construed "public interests" to include the interest in national defense. Accordingly, his construction is entitled to stand. As the Supreme Court stated in *Unemployment Comm'n* v. *Aragon*, 329 U.S. 143, 153–154:

> To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings. The "reviewing court's function is limited." All that is needed to support the Commission's interpretation is that it has "warrant in the record" and a "reasonable basis in law."

See also *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125; *Gray* v. *Powell*, 314 U.S. 402; *Securities Comm'n* v. *Chenery Corp.*, 332 U.S. 194. The principle established by the foregoing cases is even more appropriately applied here where we are concerned with the management of the public lands for which the Secretary has been given plenary authority, rather than deciding a dispute between individuals arising under the regulatory authority of an administrative agency. *Best* v. *Humboldt Mining Co.*, 371 U.S. 334.

There is no basis for petitioners' repeated assertions (Pet. 7, 8, 11, 12) that the Secretary is claiming plenary authority to dispose of the public lands without regard to the will of Congress. This is an exchange, not a sale, and, as provided for specifically by the Taylor Grazing Act, privately held land of equal value is to be received. Other statutes referred to by petitioners (Pet. 11–13, 17a–19a), which provide for disposition of public lands by sale or otherwise, are irrelevant, as are statutes for withdrawals as well as congressional action or inaction in refusing to extend the disposition powers of the Secretary in other fields.

Finally, the Secretary found that the acquisition of the private lands would consolidate holdings of public lands in the Winnemucca District and facilitate the administration and management of the area for grazing purposes. Thus, as the court of appeals unanimously agreed (Pet. App. 24a, 28a), the exchange is proper even if Section 8(b) has the limited scope for which petitioners contend.

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2. Neither the Taylor Grazing Act, the Administrative Procedure Act nor the Fifth Amendment requires a hearing as a condition precedent to an exchange of public for private lands under Section 8(b). The Administrative Procedure Act requires a hearing only where the agency statute requires one and the Taylor Grazing Act does not require hearings on proposed exchanges. Specifically, it provides (Section 8(d), Pet. 9a–10a):

> Before any such exchange under this section shall be effected notice of the contemplated exchange, describing the lands involved, shall be published * * *.

This procedure was followed and petitioners have presented their objections and information in support thereof to the department at all stages in the proceedings. Thus, in a real sense they have been "heard."

Essentially, petitioners argue (Pet. 16–17) that as holders of grazing licenses they are entitled to a hearing under Section 9 of the Grazing Act which states that the Secretary "shall provide by appropriate rules and regulations for local hearings on appeals from the decisions of the administrative officer in charge" of the grazing district. However, this provision has never been so applied, and the statutory framework indicates that it should not be. Thus, the Act provides for the establishment of grazing districts on vacant public land "pending its final disposal" (43 U.S.C. 315) and the grant of permits to graze livestock on such districts (43 U.S.C. 315b). The Secretary is given plenary authority to reclassify such lands found

to be "more valuable or suitable for any other use" (43 U.S.C. 315f) as well as to exchange these lands. The Act specifically provides that "the creation of a grazing district or the issuance of a permit pursuant to the provisions of this Act shall not create any right, title, interest, or estate in or to the lands" (43 U.S.C. 315b). Since 1934, when the statute was adopted, the Department has interpreted these interrelated provisions as authorizing the Secretary to exchange or reclassify public lands devoted to grazing without holding a hearing, whether or not grazing permits had been issued. The temporary nature of the commitment of lands to grazing, the limited status which Congress has assigned to the permit, and the broad discretion given the Secretary in making decisions to reclassify or exchange such lands confirm the correctness of this interpretation.[3]

The limited nature of the grazing permits[4] also answers petitioners' contention that the due process

[3] The Secretary has construed Section 9 to require the adoption of procedures for local hearings in those cases where hearings are specifically required by other provisions of the statute (i.e., Section 1, 43 U.S.C. 315, requires a hearing before grazing districts are created), and on matters "that arise in the administration of grazing districts." *M. C. Steele* v. *Ruby Rector Kirby*, 60 I.D. 389, 394; 43 CFR 161.9(d), 161.10. The court of appeals recognized this as the proper interpretation of the "local hearing" provision of the Act (Pet. App. 26a).

[4] It is clear from Section 3 of the Act (43 U.S.C. 315b) that possession of a permit does not give the holder any vested right to the lands. *Osborne* v. *United States*, 145 F. 2d 892 (C.A. 9); *United States* v. *Cox*, 190 F. 2d 293 (C.A. 10), certiorari denied, 342 U.S. 867; *Oman* v. *United States*, 179 F. 2d 738 (C.A. 10). Section 3 is simply expressive of the settled law at the time the Act was passed that the fact that the United

clause forbids approval of the exchange without an adversary hearing on the termination of their permits. Indeed, petitioners concede that they have no "right, title and interest in and to the public domain as would entitle them to just compensation" (Pet. 18). Yet they urge that they have "a right to use the public domain," which amounts to a property right which cannot be withdrawn without a hearing. How they leap the gap is not clear. Neither *Red Canyon Sheep Co.* v. *Ickes*, 98 F. 2d 308 (C.A. D.C.), nor *McNeil* v. *Seaton*, 281 F. 2d 931, 934 (C.A. D.C.), cited by petitioners (Pet. 18), supports them.[5] Accordingly, the Secretary was fully justified in following prior departmental decisions denying an evidentiary hearing as part of the exchange procedure.

3. The short answer to petitioners' contention (Pet. 19–21) that the pledge of the ranch as partial security for a loan precludes the exchange is that the provision of the Act on which they rely (43 U.S.C. 315b) applies only to the renewal of permits and the establishment of preferences between permittees and applicants for permits. It makes no reference to exchanges. Moreover, as the court of appeals said,

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States had allowed its public lands to be used for grazing "did not confer any vested right on the complainant, nor did it deprive the United States of the power of recalling any implied license under which the land had been used for private purposes." *Light* v. *United States*, 220 U.S. 523, 535.

[5] *Red Canyon* holds that a Taylor Grazing Act licensee has standing to question in court the legality of a proposed exchange. But standing to sue cannot be converted into a constitutional right to the land. *McNeil* involved the question of awarding preferential rights to one applicant rather than another and is accordingly inapposite here.

such a construction would be directly contrary to the provisions of Section 3 that a permit "shall not create any right, title, interest, or estate in or to the lands." It should also be noted that this contention was not made at any stage of the administrative proceedings.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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JANUARY 1964.

APPENDIX

1. Section 3 of the Taylor Grazing Act, 43 U.S.C. 315b, provides in pertinent part:

> The Secretary of the Interior is authorized to issue or cause to be issued permits to graze livestock on such grazing districts to such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled to participate in the use of the range, upon the payment annually of reasonable fees * * *. Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied, or leased by them, except that until July 1, 1935, no preference shall be given in the issuance of such permits to any such owner, occupant, or settler, whose rights were acquired between January 1, 1934, and December 31, 1934, both dates inclusive, except that no permittee complying with the rules and regulations laid down by the Secretary of the Interior shall be denied the renewal of such permit, if such denial will impair the value of the grazing unit of the permittee, when such unit is pledged as security for any bona fide loan. * * * So far as consistent with the purposes and provisions of this chapter, grazing privileges recognized and acknowledged shall be adequately safeguarded, but the creation of a grazing district or the issuance of a permit pursuant to the provisions

of this chapter shall not create any right, title, interest, or estate in or to the lands. * * *

2. Section 8 of the Act, 43 U.S.C. 315g, provides in pertinent part:

> (a) Where such action will promote the purposes of a district or facilitate the administration of the public lands, the Secretary is authorized to accept on behalf of the United States any lands within or without the exterior boundaries of a grazing district as a gift.
>
> (b) When public interests will be benefited thereby the Secretary is authorized to accept on behalf of the United States title to any privately owned lands within or without the boundaries of a grazing district, and in exchange therefor to issue patent for not to exceed an equal value of surveyed grazing district land or of unreserved surveyed public land in the same State or within a distance of not more than fifty miles within the adjoining State nearest the base lands.
>
> (c) Upon application of any State to exchange lands within or without the boundaries of a grazing district the Secretary of the Interior shall, and is directed to proceed with such exchange at the earliest practicable date and to cooperate fully with the State to that end, but no State shall be permitted to select lieu lands in another State. The Secretary of the Interior shall accept on behalf of the United States title to any State-owned lands within or without the boundaries of a grazing district, and in exchange therefor issue patent to surveyed grazing district land not otherwise reserved or appropriated or unappropriated and unreserved surveyed public land; and in making such exchange the Secretary is authorized to patent to such State, land either of equal value or of equal acreage; *Provided,* That no State shall select public lands in a grazing dis-

trict in furtherance of any exchange unless the lands offered by the State in such exchange lie within such grazing district and the selected lands lie in a reasonably compact body which is so located as not to interfere with the administration or value of the remaining land in such district for grazing purposes as set forth in this chapter.

* * * * *

(d) Before any such exchange under this section shall be effected, notice of the contemplated exchange, describing the lands involved, shall be published by the Secretary of the Interior * * *.

3. Section 9 of the Act, 43 U.S.C. 315h, provides in pertinent part:

* * * The Secretary of the Interior shall provide by appropriate rules and regulations for local hearings on appeals from the decisions of the administrative officer in charge in a manner similar to the procedure in the land department. * * *